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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

CECIL E. DANIEL and ANN M. DANIEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM A. THORNE
WORTH N. YODER
THORNE & YODER
228 West High Street
Elkhart, Indiana 46514

JOHN D. SHUMAN
542 Communicana Building
Elkhart, Indiana 46514

Attorneys for Petitioners

Washington, D. C. THIEL PRESS 202 393 0625

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Cecil E. Daniel and Ann M. Daniel respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 28, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit appears in the appendix hereto, and is reported at 454 F.2d 1166.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the U.S. Internal Revenue Service sustained its burden of proof of mailing of a notice of disallowance of a refund claim under 26 U.S.C. § 6532(a)(1) in the absence of both (1) direct evidence of such mailing and (2) proof of invariable office custom which would indicate such mailing.

2. Whether, when the Statute of Limitations, 26 U.S.C. § 6532(a)(1), starts to run upon the mailing of notice by IRS, and the only evidence of mailing is circumstantial evidence of mailing pursuant to office custom, with admitted and unexplained departures from the custom in the instant case, the taxpayer was denied due process of law by a holding that the Statute of Limitations began to run at the time of the purported mailing of notice.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

§ 6532(a)(1) Suits by taxpayers for refund.

* * *

(1) General rule. No suit . . . for the recovery of any internal revenue tax . . . shall be begun . . . after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit . . . relates.

STATEMENT OF THE CASE

This case was filed by these petitioners for refund of overpayments of income taxes for the years 1955 and 1956 [1a-4a][1]. Federal jurisdiction of the district court arose under the provisions of 28 U.S.C. § 1346(a)(1). The issues were (a) whether certain real estate transactions should have been taxed at capital-gain or ordinary-income rates and (b) whether IRS had mailed notice of disallowance of the petitioners' claims for refunds more than 2 years prior to petitioners' filing an action for refund in the U.S. District Court [5a]. The case on its merits was decided by the district court in the taxpayers' favor [140a-142a]. The issue of mailing—on which the United States had the burden of proof—was resolved against the petitioners [135a-140a].

To prove the mailing the government offered no direct evidence of mailing. Apparently to invoke the "office custom" rule, the IRS presented testimony that its Detroit office always dated certified mail the day it was actually mailed [32a, 33a, 35a-37a]. It then introduced into evidence a certified mail stub (NOT a return receipt) showing a date different from the date of the alleged notice of disallowance [14a, 16a, 35a, 36a]. Additionally, it appeared affirmatively by IRS testimony that the mailing receipt in this case had been stapled and restapled to something such a number of times as to indicate handling inconsistent with the testimony as to what the office custom was on preservation of records of mailing [40a-44a]. The taxpayers both denied receipt of the notices [11a, 12a, 87a].

In other words, the government's evidence of mailing, consisting of the testimony of personnel in the Detroit IRS office, showed that whatever might have been the custom of that office in sending disallowance notices by certified mail, the custom was not followed in this case. It is submitted, therefore, that the evidence did not show there was a mailing

[1]Bracketed references herein are to the page numbers in the joint appendix filed with the Court of Appeals for the Sixth Circuit.

of the required notice in this case, nor did the evidence justify an inference of mailing under the "office custom" rule.

The holding of the Court of Appeals here consisted of its statement that the

> ". . . evidence consisted of: (1) the testimony of unit supervisors for the Internal Revenue Service that by office custom the notice in question was sent to taxpayers by certified mail, and (2) the production of stamped receipts of the sender (the I.R.S.) which had been addressed to the taxpayers . . . *Any further proof of mailing by certified mail or of the mechanical details thereof would have only provided corroboration of the fact of mailing.*" [emphasis supplied] *Daniel v. United States*, 454 F.2d 1166, 1167.

The statement reflects a most unfortunate and, to the petitioners, damaging misreading of the trial record. Supervisors did not testify that by office custom "the notice in question was sent . . ." On the contrary, these supervisors testified that office custom, such as it was, was not followed in the instant case [14a, 16a, 35a, 36a, 40a-44a].

Even more foreign to the record is the italicized statement above that "further proof" would only have corroborated the fact of mailing. There was "further proof" here, and it showed material deviations from the office custom of the Detroit IRS office and, in fact, was self-refuting of the invariability of the custom claimed to exist and indispensible to lawful application of the office custom rule to prove mailing.

REASONS FOR GRANTING THE WRIT

I.

THE U.S. COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW; THE ISSUE OF PROOF OF NOTICE OF MAILING WHICH STARTS THE RUNNING OF A STATUTE OF LIMITATIONS, WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT, AND HAS DECIDED THE QUESTION IN A MANNER SUCH AS GIVES THE ISSUE THE CONSTITUTIONAL DIMENSION OF A DENIAL OF DUE PROCESS.

No taxpayer's suit for refund may be instituted more than two years from the date of mailing to the taxpayer by certified or registered mail a notice that the taxpayer's claim for refund had been disallowed. 26 U.S.C. § 6532(a)(1). To bar such taxpayer's suit by this Statute without proof that such notice had been mailed would deprive the taxpayer of due process of law under the U.S. Constrtution, Amendment V. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950); *Schroeder v. City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962). Consequently, to allow proof of mailing to be based exclusively on self-refuting evidence is in itself a failure of due process of law. *Accord, Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed.2d 242, 80 S.Ct. 274 (1960).

In the absence of direct evidence of mailing, the "office custom" rule, which has been established by court decisions, permits an inference of mailing from (1) direct evidence of such large volumes of mail that direct testimonial evidence of the mailing of a specific item is a practical impossibility, (2) direct evidence of invariable adherence to an "office custom" which would result in the mailing of a class of items, and (3) other evidence, such as a file record, that would place the item in question within the class of items to which the invariable custom applies. *United States v. Barnette*, 91 F.2d 10 (5th Cir. 1937); *United States v. Rice*, 281 F.326 (1922);

Orlex Dyes & Chemicals Corporation v. United States, 168 F. Supp. 220 (1958); *Matsko v. Dally*, 49 Wash.2d 370; *Clayton Packaging Co. v. United States*, 150 F. Supp. 628.

Ordinarily, of course, errors in the application of the rules of burden of proof do not raise questions of procedural due process. A serious and unique question never ruled on by this Court is raised, however, when proof of a fundamental requirement of due process is held by a District Court and a Court of Appeals to be proven, and when the record shows that the finding was clearly beyond any direct evidence and outside the only rule of circumstantial evidence that could be applied, *i.e.*, the "office custom" rule. In brief, the constitutional right to the notice is abrogated to the extent that proof of such notice is either dispensed with or improperly held to exist. To hold that a constitutionally required notice was mailed, on the basis of a clearly erroneous misapplication of the "office custom" rule, is itself a denial of due process of law. See *Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed.2d 242, 80 S.Ct. 274 (1960).

There was not, in the trial evidence, any direct evidence of mailing of the notice of disallowance, certified or otherwise, and the taxpayers each denied receipt of it [11a, 12a, 87a]. There was, however, testimony that as regards the "office custom" in the Detroit IRS office all notices of disallowance were always (1) dated on the day of mailing [32a, 33a, 35a-37a], (2) promptly hand carried to the post office [32a, 33a, 35a], where (3) a sender's receipt (*not* a return receipt) was obtained [14a, 16a, 38a], and (4) the receipt was always stapled to a file copy of the notice [38a, 39a] and (5) thereupon sent to a filing place [39a, 40a].

On the other hand, the government's trial evidence relating to the particular notice claimed here by the IRS as having been mailed, showed that there was no sender's receipt bearing the same date as a purported file copy of the notice in the IRS file. The government's evidence also was that the sender's receipt attached to the copy had been repeatedly stapled to and removed from something. The continuity of the whereabouts of the sender's receipt and the file copy of

the notice could, therefore, not be explained, and admittedly the documents were not handled according to the IRS "office custom".

Accordingly, in the face of the admitted departures from office custom—without tender of explanation of these departures—the court was not warranted in inferring that there was, in fact, a mailing. Conceding to the government all proper inferences the record affirmatively shows denial of procedural due process in that notice, which is essential to procedural due process, was not proved. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed 865, 70 S.Ct. 652 (1950); *Schroeder v. City of New York*, 371 U.S. 208, 9 L.Ed.2d 255, 83 S.Ct. 279 (1962). *Accord, Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed.2d 242, 80 S.Ct. 274 (1960).

The finding by the District Court that there had been a mailing by IRS of the notice of disallowance is, therefore, clearly erroneous, and the finding is not entitled to the approval sanctioned under Rule 52, Federal Rules of Civil Procedure.

The decision of the Court of Appeals in this case, if permitted to stand, will represent the extreme reach of the law concerning what circumstantial evidence will permit a finding that legal notice was mailed. To hold, in effect, as the Court of Appeals did here, that notice, while required, need not really be shown in the courtroom, is to say that notice is not really required in the first place.

Thus is raised an important question of federal law not previously decided by this Court but eminently qualified for the Court's time and attention. If the decision of the Court of Appeals in this case is allowed to stand, authority will exist on the facts of this case that an act—such as the giving of notice—required by procedural due process may be proved by evidentiary standards less stringent than those applied to ordinary matters. Such authority must not be allowed to stand, for its existence will give rise not only to court decisions, but also to administrative procedures, in derogation of fair procedure and the fundamental rights of citizens.

II.

IN PURPORTING TO APPLY THE "OFFICE CUSTOM" RULE TO PROVE MAILING, WHEN THE UNDERLYING ELEMENTS OF THE RULE WERE LACKING, THE COURT OF APPEALS AND THE DISTRICT COURT SANCTIONED AND INDULGED IN A DEPARTURE FROM ACCEPTED JUDICIAL PROCEEDINGS TO A DEGREE CALLING FOR THE EXERCISE BY THE SUPREME COURT OF ITS SUPERVISORY POWERS.

The customary office policy of the IRS in this case, according to the record, is for the typist to prepare those notices to be mailed by certified mail and mail them herself immediately [35a]. In the instant case, however, the notice was dated one day subsequent to the date of the mailing receipt [34a, 35a], which could be explained by the government's witnesses only by speculation that the instant notice was handled not as a matter for certified mailing, but as a routine matter, and as such was typed in the afternoon and postdated—as was policy for routine matters—on the assumption that it would be mailed the next day [36a]. This explanation, however, was only speculation, and was not supported by any evidence—direct or circumstantial—whatsoever. On the contrary, the government's witness in response to questions by the Court could not explain the handling of a "certified mail" notice in this manner in terms of the office custom claimed to prevail in the Detroit IRS office [41a, 42a]. Nor could the witness explain the obvious mismatching of staple holes between the mailing receipt and the file copy of the notice letter to which it was attached at the time of trial [40a, 42a, 43a]. Thus, the government failed to prove invariable office custom, and instead proved not only that office custom was varied, but also that it varied in the instant case. To hold, on such evidence, that mailing was proved, is to abolish the "office custom" rule in the Sixth Circuit.

Such a departure by the Sixth Circuit from existing law calls for this Court to review this case in exercise of its supervisory powers.[2]

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

William A. Thorne
Worth N. Yoder
WORTH & YODER

228 West High Street
Elkhart, Indiana 46514

John D. Shuman

542 Communicana Building
Elkhart, Indiana 46514

Attorneys for Petitioners

April, 1972

[2] A reversal of this case would not hamper IRS operations since IRS could, at its option, henceforth send its notices of disallowance of claims by registered or certified mail *return receipt requested*, which, while not required by the Statute, 26 U.S.C. § 6532(a)(1), is not prohibited by it. The cost is 30 cents (39 Code of Federal Regulations, 168.3). On the other hand, if return receipts are onerous, IRS could simply follow its own "office customs" invariably.

No. 71-1234

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL E. DANIEL and ANN M. DANIEL,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Michigan, Southern Division.

Decided and Filed January 28, 1972.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PER CURIAM. This appeal is taken from the judgment of the District Court dismissing appellants-taxpayers' suit for refund on the ground that the Court was without jurisdiction to consider the claim. The District Court found that the Government had mailed a notice of disallowance of the refund to taxpayers in July, 1962, and that the present suit not having been instituted until January, 1968, was barred by the two-year statute of limitations under 26 U.S.C. § 6532 (a)(1).

Whether or not the notice of disallowance was mailed to taxpayers is a question of fact which cannot be disturbed on appeal unless the finding thereon is clearly erroneous. Rule 52, Fed. R. Civ. Pro. Herein the Government introduced sufficient evidence to show the fact of mailing, which evidence consisted of: (1) the testimony of unit supervisors for the Internal Revenue Service that by office custom the notice in

question was sent to taxpayers by certified mail, and (2) the production of stamped receipts of the sender (the I.R.S.) which had been addressed to taxpayers. *See Roupp* v. *Woods*, 177 F.2d 149, 151 (Em. App. 1949). Any further proof of mailing by certified mail or of the mechanical details thereof would have only provided corroboration of the fact of mailing. In the exercise of its discretion the trial court would have been justified in receiving such corroborative evidence if offered, but no duty to make such a tender rested upon the appellee.

Under the circumstances of the instant case, we cannot say that determination by the District Court that a mailing in fact occurred was clearly erroneous. The judgment of the District Court is affirmed.